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Robert E. Corbin

September 18, 1990

Arter L. Johnson, Chairman
Arizona Board of Pardons & Paroles
1645 West Jefferson, Suite 326
Phoenix, Arizona 85007

Re: I90-080 (R89-132)

Dear Mr. Johnson:

You asked whether the Board of Pardons and Paroles (Board) is responsible for any administrative, operational and financial functions of the Board in view of recent statutory amendments which provide that such functions shall be performed for the Board by its executive director. See Laws 1989 (1st Reg. Sess.) Ch. 300 (Chapter 300). We conclude that the Legislature delegated these responsibilities to the Board's executive director, who must perform the functions on behalf of the Board. You also asked what, if any, responsibility the Board has in the hiring or disciplining of the Board's staff. We conclude that the Legislature has delegated these employment decisions to the Board's executive director, who is accountable to the Board for his or her performance.

The powers and duties of administrative agencies are to be measured by the statutes creating them. Ayala v. Hill, 136 Ariz. 88, 90, 664 P.2d 238, 240 (1983). In 1989, the Legislature amended the statutory powers of the Board to provide for an executive director to perform administrative functions and employment functions for the Board. Laws 1989 (1st Reg. Sess.) Ch. 300. The newly-amended powers of the Board, pursuant to A.R.S. § 31-402, are set out in pertinent part as follows:

A. The board of pardons and paroles shall have exclusive power to pass upon and recommend

reprieves, commutations, paroles and pardons. No reprieve, commutation or pardon may be granted by the governor unless it has first been recommended by the board.

. . . .

C. The executive director shall perform all administrative, operational and financial functions for the board.

D. The executive director may employ case analysts as deemed necessary within the limits of legislative appropriation. The analyst shall aid the board in making investigations, in securing information and in performing necessary administrative functions to assist the board in passing upon applications for parole and commutation.

E. The executive director may employ hearing officers as deemed necessary within the limits of legislative appropriation. The hearing officers shall conduct parole and absolute discharge hearings and shall make recommendations to the board. Hearing officers shall not conduct hearings for commutation of sentence, pardons, reprieves or parole revocations.

(Emphasis supplied.) The powers of the executive director in section 31-402(D),(E) had been the exclusive authority of the Board prior to enactment of Chapter 300. See Laws 1989 (1st Reg. Sess.) Ch. 300. See also Ariz. Att'y Gen. Op. 185-072.

"When the Legislature changes the language of a statute, the presumption is that they intended to make a change in existing law." Brousseau v. Fitzgerald, 138 Ariz. 453, 455, 675 P.2d 713, 715 (1984). A.R.S. § 31-402 now provides that the administrative, operational and financial functions of the Board shall be provided by the executive director who may employ various employees to carry out those functions. Generally, the word "shall" is mandatory and the word "may" is permissive, and where both verbs are used in a statute they are presumed to have their ordinary meaning. Matter of Guardianship of Cruz, 154 Ariz. 184, 185, 741 P.2d 317, 318 (Ct. App. 1987). Using the above rules of statutory construction we conclude that the Legislature has conveyed performance of the administrative, operational and financial functions of the Board to the Board's executive director, who has exclusive power to hire and discipline the personnel under the executive director's authority.

We note, however, that the Legislature also provided that the Board "shall employ an executive director" A.R.S.

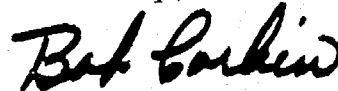
Mr. Arter Johnson, Chairman
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§ 31-401(I) (emphasis supplied). In construing a similar statutory provision relating to the power of a school board to "employ" a school superintendent, the Supreme Court of Alaska held that the power to "employ" did not mean only the power to select the person who is to hold the position.

Implicit in the board's duty to "employ" a superintendent are duties such as the following: to determine what the duties of the position of superintendent shall be, to advise the superintendent on the manner in which it wishes him to perform his duties, to evaluate his performance, and to determine from time to time whether he should be retained or whether they should "employ" someone else.

Meiners v. Bering Strait School District, 687 P.2d 287, 300 (Alaska 1987). The above reasoning of the Alaska Supreme Court is a persuasive statement of the powers implied by an agency's authority to "employ" its personnel. Therefore, we conclude that the Board retains this power of employment over the executive director, in addition to its other powers, such as the authority to adopt rules, A.R.S. § 31-401(F), to pass upon reprieves, commutations, paroles and pardons, 31-402(A), and to convene official meetings of the Board, A.R.S. § 31-401(A), (B), (G), (H).

Sincerely,



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Attorney General

BC:LPF:lpf